IP 03-1257-C Y/K Standard Ins v Behrends
Judge Richard L. Young Signed on 2/28/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STANDARD MUTUAL INSURANCE COMPANY, TWB, Minor, EAD, Minor,	)	
Plaintiffs,	)	
vs.	)	NO. 1:03-cv-01257-RLY-TAB
LOUIS N. BEHRENDS, LISA M. DAVIS, JOHN E. DAVIS, STANDARD MUTUAL INSURANCE COMPANY,	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STANDARD MUTUAL INSURANCE COMPANY, Plaintiff, vs. T.W.B., b/n/f LOUIS N. BEHRENDS, E.A.D., b/n/f LISA M. DAVIS, LISA M. DAVIS, Individually, and JOHN E. DAVIS, Individually, Defendants.	)	1:03-cv-1257 RLY-TAB
T.W.B., b/n/f LOUIS N. BEHRENDS, Counter-Claimant, vs. STANDARD MUTUAL INSURANCE COMPANY, Counter-Defendants.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND ON THE DAVISES' MOTION TO STAY

This matter is before the court on Plaintiff Standard Mutual Insurance Company's ("SMIC") Motion for Summary Judgment; on Defendant E.A.D. by next friend Lisa M. Davis ("E.A.D."), Lisa M. Davis, individually, and John E. Davis', individually (collectively, "the Davises") Motion for Summary Judgment; and on the Davises' Motion to Stay Rulings on Summary Judgment Motions. The court hereby **denies** the Davises' Motion to Stay. For the following reasons, SMIC's Motion for Summary Judgment is **granted** and the Davises' Motion for Summary Judgment is **denied**.

I. Factual Background

On March 18, 2003, defendant/counter-claimant T.W.B. went to a K-Mart store and picked out an air rifle that his older friend, Derek A. Gause, then purchased for him. Upon returning to the Gauses' home, T.W.B. loaded the air rifle with BB pellets and spent time shooting at various targets in and around the Gauses' yard. (Standard Mutual Insurance Company's Complaint for Declaratory Judgment ("Complaint") at ¶ 2.8).

Eventually, E.A.D. approached the Gauses' home on his bicycle, which he disembarked and walked next to as he approached the Gauses' garage, where T.W.B. was located. T.W.B. saw E.A.D. approaching, pointed the gun in E.A.D.'s direction, and then fired the gun toward E.A.D. (T.W.B. Deposition at 25, 70). One of the pellets from T.W.B.'s gun hit E.A.D., causing the permanent loss of his left eye.

Both T.W.B. and E.A.D. were minors at all times relevant to these proceedings. At the time of the injury, T.W.B.'s parents, Louis N. Behrends and Barbara A. Behrends (collectively, "the Behrendses"), were covered by a homeowners' insurance policy issued by SMIC. (Complaint ¶ 2.2). T.W.B. was an additional insured party under his parents' policy with SMIC.

At issue in the declaratory judgment action pending before this court is whether, under the homeowners' policy, SMIC has a duty to defend or indemnify T.W.B. in the state court tort case that arose as a result of E.A.D.'s injury. (Complaint ¶¶ 2.15, 2.16). On June 30, 2003, the Davises filed a negligence suit against T.W.B. and the Gauses in Hamilton Superior Court.[1] The state court action is still ongoing. On August 29, 2003, SMIC filed the present federal court action for declaratory judgment ("the 1st DJ") against the Davises and T.W.B. SMIC seeks to

[1]The state court case is *E.A.D. b/n/f Lisa M. Davis, Lisa M. Davis, Individually, John E. Davis, Individually, Plaintiffs, v. Mark A. Gause, Ramona J. Gause, Derek A. Gause, and T.W.B., Defendants,* Cause No. 29D03-0306-CT-557, Hamilton Superior Court No. 3.

have this court declare that it is not required to defend or indemnify T.W.B. in the state court proceedings. (Complaint ¶¶ 3.1, 3.2).

In response to SMIC's action for declaratory judgment, T.W.B. filed his motion for stay of proceedings in this court on September 17, 2003. The Davises followed with their own motion to dismiss or stay on October 27, 2003. This court denied the motions to stay and dismiss in its October 18, 2004 Order.

As SMIC's declaratory judgment case (again, "the 1st DJ") was developing, a separate set of related proceedings were underway. On September 26, 2003, the Davises filed an action for declaratory judgment in Hamilton Superior Court, which the parties refer to as "the 2nd DJ." On October 8, 2003, SMIC removed the 2nd DJ to federal court as *Davis v. Standard Mutual Insurance Company*, No. 1:03-cv-1474-RLY-WTL (S.D.Ind. filed October 8, 2003). Both T.W.B. and the Davises filed motions to remand the 2nd DJ to state court, which were denied in this court's October 18, 2004 Order.

The 1st DJ and the 2nd DJ raise similar issues, with one exception. The 1st DJ includes T.W.B.'s counterclaim that SMIC acted in bad faith and the 2nd DJ does not. (T.W.B. b/n/f Louis N. Behrends' Answer at 4-6). However, since both declaratory judgment actions involve the question of whether SMIC is obligated to defend or indemnify T.W.B., the 2nd DJ has been consolidated into this case.

In July 2004, SMIC and the Davises each filed Motions for Summary Judgment. The court heard oral argument on the Motions for Summary Judgment on February 1, 2005. Those motions are the subject of today's Entry.

II. Standard for Summary Judgment

A party is entitled to summary judgment "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it is outcome determinative. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine "only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Pipitone v. United States*, 180 F.3d 859, 861 (7th Cir. 1999).

In determining whether a genuine issue of material fact exists, the court must view the record and all reasonable inferences in the light most favorable to the non-moving party. *National Soffit & Escutcheons, Inc. v. Superior Systems, Inc.*, 98 F.3d 262, 265 (7th Cir. 1996). The moving party bears the burden of demonstrating the "absence of evidence on an essential element of the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The non-moving party may not, however, simply rest on the pleadings, but must demonstrate by specific factual allegations that a genuine issue of material fact exists for trial. *National Soffit & Escutcheons, Inc.*, 98 F.3d at 265.

III. Analysis

This court has jurisdiction to hear the matter before it pursuant to § 1332(c)(1). The parties are diverse in that SMIC is an Illinois corporation and the Behrendses and Davises are citizens of Indiana. *See* October 18, 2004 Order. There is no dispute that the amount in controversy exceeds $75,000.

Indiana State law is controlling in this case. *General Accident Insurance Co. v. Gonzales*, 86 F.3d 673, 675 (7th Cir. 1996). Under Indiana law, insurance policies are evaluated under the same rules of interpretation as other contracts. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985), *cert. denied* 479 U.S. 1060 (1987). The court interprets insurance

policy terms from the perspective of an ordinary person of average intelligence. Ambiguities in insurance contracts are generally construed against the insurer. *Jim Barna Log Systems Midwest, Inc. v. General Casualty Ins. Co. of Wisconsin*, 791 N.E.2d 816, 823 (Ind. Ct. App. 2003). However, when the injured party is someone other than the insured, as in this case, the policy is construed from a neutral perspective. *Barga v. Indiana Farmers Mut. Ins. Group, Inc.*, 687 N.E.2d 575, 578 (Ind. Ct. App. 1997).

A. The Policy Language

The cross-motions for summary judgment address the question of whether SMIC is obligated to defend or indemnify T.W.B. under the Behrendses' homeowners insurance policy. SMIC argues that the shooting was not an occurrence under the policy, and the Davises and Behrendses argue that the shooting was an occurrence covered by the policy. The policy states, in relevant part:

> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this policy applies, we [SMIC] will:
> 1. Pay up to our legal limit of liability for the damages for which the "insured" is legally liable. Damages include prejudgment interest awarded against the "insured"; and
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false, or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle any claim or defend ends when the amount we pay for damages resulting from the "occurrence" equals our limit of liability.

(SMIC Exhibit A, Homeowners Policy at 11). Further, the policy defines an "occurrence" as:

> an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
> a. "Bodily injury"; or
> b. "Property damage."

(*Id*. at 1). The term "accident" is not defined in the policy.

B. The Motions for Summary Judgment

Whether SMIC is obligated to defend T.W.B. depends on whether T.W.B.'s conduct can be construed as an accident under Indiana law. SMIC argues that because T.W.B. shot the gun on purpose, the fact that the BB hit E.A.D. in the eye cannot be considered an accident. The Davises counter that because T.W.B. did not intend or expect to harm E.A.D., the injury was an accident even though discharging the gun was volitional.

Under Indiana law, an accident is generally defined as "an unexpected happening without intention or design." *National Mut. Ins. Co. v. Eward*, 715 N.E.2d 95, 100 (Ind. App. 1987); *see also, Jim Barna Log Systems Midwest, Inc. v. General Casualty Ins. Co. of Wisconsin*, 791 N.E.2d 816, 824 (Ind. Ct. App. 2003). In *Red Ball Leasing*, the Seventh Circuit "held that intentional acts are not 'accidents' as that term is used in the standard insurance policy definition of 'occurrence.'" *Fidelity and Guaranty Insurance Underwriters, Inc. v. Everett I. Brown Co., L.P.*, 25 F.3d 484, 487 (7th Cir. 1994) (reaffirming the holding of *Red Ball Leasing, Inc. v. Hartford Accident & Indemnity Co.*, 915 F.2d 306 (7th Cir. 1990)). Under *Red Ball* and its progeny, a distinction has been drawn between unintended events and intended events with unintended results. *See, e.g., Red Ball*, 915 F.2d at 311; *Allstate Insurance Company v. Davis*, 6 F.Supp.2d 992, 994-95 (S.D.Ind. 1998) (Barker, J.); *Allstate Insurance Company v. Norris*, 795 F.Supp. 272, 275 (S.D.Ind. 1992) (McKinney, J.). In light of this distinction, the court today looks to the intended conduct of the insured party, not to the unintended impact of that conduct upon third parties.

Clearly, based on the record before the court, T.W.B. did not intend to injure E.A.D. (*See, e.g.*, T.W.B. Deposition at 76-77). However, T.W.B. did consciously aim and discharge

the air rifle toward E.A.D. (*See, e.g.*, T.W.B. Deposition at 25, 70, 72-73). T.W.B.'s firing of the air rifle was an intentional act. (*Id*.; *see also, Norris*, 795 F.Supp at 275 (granting summary judgment to insurer when shooter intentionally discharged weapon, unintentionally hitting a bystander)). His intentional act had unfortunate, unintended consequences, but an act's consequences do not change the nature of the act itself. Since T.W.B.'s firing of the gun was not an accident, the shooting is not an occurrence under the Behrendses' homeowners' insurance policy. As such, SMIC is under no obligation to indemnify or defend T.W.B.

SMIC also moved for summary judgment of the Behrendses' bad faith counterclaim against SMIC. Given today's decision that SMIC is not obligated to defend or indemnify T.W.B., it necessarily follows that SMIC was not acting in bad faith when it initially offered to defend T.W.B. under a reservation of rights. Therefore, the court's grant of summary judgment in SMIC's favor extends to the bad faith counterclaim.

IV. Conclusion

For the foregoing reasons and based on review of the pleadings and exhibits before the court, SMIC's Motion for Summary Judgment is hereby **granted**, both as to SMIC's declaratory judgment claim and as to T.W.B.'s bad faith counterclaim. SMIC is not obligated to defend or indemnify T.W.B. Further, the Davises' Motion to Stay Rulings on Summary Judgment Motions and their Motion for Summary Judgment are hereby **denied**.

It is so ordered this 28th day of February 2005.

1:03-cv-1257 RLY/TAB RICHARD L. YOUNG, JUDGE

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